FOR ARGUMENT

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Nos. 77-1652 and 77-1654

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY, ET AL.

CONSUMER ENERGY COUNCIL OF AMERICA,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION AS RESPONDENT IN NO. 77-1654

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The brief of the Consumer Energy Council of America ("CECA")[1] as petitioner in No. 77-1654 addresses two questions. The first substantially overlaps the question presented by the Federal Energy Regulatory Commission as petitioner in No. 77-1652: Whether the "production or gathering" exclusion in Section 1(b) of the Natural Gas Act, 15 U.S.C. 717 (b), denies the Commission the authority to require certificated producers of natural gas to "observe the standard of a prudent operator" in developing and maintaining delivery of gas from their dedicated reserves.[2] CECA's second question (Br. 3) is based on its contention (Br. 27-50) that the "prudent operator" standard adcpted by the Commission does not constitute a proper measure for enforcing producer delivery obligations under certificates of public convenience and necessity. This memorandum is submitted by the Commission as respondent in No. 77-1654 in answer to this contention.

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[1] On November 27, 1978, the Court granted CECA's motion for substitution as successor to the Consumer Federation of America, Energy Policy Task Force. In this memorandum, "CECA" will designate both the original petitioner and its successor.

[2] The difference is that CECA states the question (Br. 2) in terms of the Commission's authority to enforce producers' delivery obligations "in accordance with an appropriate standard," rather than in accordance with the "prudent operator" standard adopted by the Commission in the order under review. This difference is subsumed in CECA's second question, discussed in the text.

CECA's second question was not ruled on by the court of appeals.[3] It therefore may not be ripe for consideration by this Court at this time. However, if the Court should choose to reach the question in the interest of judicial economy,[4] we submit that the Commission's decision should be affirmed.

The substance of CECA's argument is that the Commission's prudent operator standard "is not a service-oriented standard" (Br. 37) and that it is also vague and unenforceable (*id.* at 43). The argument reduces to the claim that the Commission, in exercising its rule-making authority toward an admittedly appropriate end, would have promoted that end more effectively by making a somewhat different rule from the one it made. Judicial acceptance of such a claim would invade the authority that Congress has given to the Commission. But assuming that a court may appropriately give substantive con-

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[3] The court stated (Pet. App. 10a n.6; emphasis in original):

> One final question raised concerns the "prudent operator" standard promulgated by Order No. 539-B. The argument is advanced that the "prudent operator" standard is inappropriate to FERC's goal to increase production of natural gas because "prudent operator" is a term of art employed in state regulations which are concerned with increasing the total recovery of hydrocarbons through the *conservation* of natural gas fields rather than permitting operators to waste energy resources by *exploitation* of reserves. We do not reach the issue due to our disposition on jurisdictional grounds.

[4] See, *e.g.*, *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, No. 77-837 (December 5, 1978), slip op. 12 & n.13.

sideration to CECA's criticisms of the Commission's rule, those criticisms are unpersuasive.

1. In formulating the delivery obligations of producers in terms of the standard of a "prudent operator," the Commission was well within its statutory discretion. Order No. 539-B, establishing the prudent operator standard, constitutes a statement by the Commission of what the Natural Gas Act requires—an interpretation of the statute by the expert agency charged with its administration. As this Court has frequently stated, such an interpretation is entitled to considerable deference and ought to be accepted by a reviewing court if it is reasonable, whether or not the Commission might reasonably have chosen some other formulation of what the Act requires. See *Zenith Radio Corp.* v. *United States*, No. 77-539 (June 21, 1978), slip op. 7; *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

In addition, the Commission's decision here represents its expert conclusion, based on its cumulative experience and knowledge of the natural gas industry, that the prudent operator standard will enable it to enforce the service obligation that the Act imposes on certificated natural gas companies. That conclusion is also entitled to great weight. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968); *FPC* v. *Natural Gas Pipeline Company*, 315 U.S. 575, 586 (1942). Cf. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953). As one court has stated with respect to the Commission's authority to structure

policies and remedies (*Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)):

> * * * [T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.

The Commission's power to adopt rules implementing service obligations under Sections 7 and 4 of the Natural Gas Act, 15 U.S.C. 717f and 717c, is based on Section 16 of the Act, which authorizes the Commission to issue "such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 15 U.S.C. 717*o*. If we are correct that the production or gathering exclusion in Section 1(b) does not bar adoption of a deliverability standard for dedicated gas (see the Commission's main brief)—a position with which CECA agrees—then the criteria embodied in the prudent operator standard are "based on permissible public interest goals and, so long as [they] are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in [prior cases]."[6] *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796

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[6] See, *e.g.*, *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 776; *FPC* v. *Texaco Inc.*, 377 U.S. 33, 41 (1964).

(1978). Accord, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 543-544 (1978).[6]

2. CECA is incorrect in contending (Br. 37-43) that the prudent operator standard does not reflect the service obligation embodied in Section 7 of the Natural Gas Act. As we have explained in our opening brief, the Commission's rationale for promulgating the prudent operator standard was that once a producer obtains a certificate authorizing the sale of gas in interstate commerce (usually pursuant to a gas sales contract filed with the certificate application), the producer has a continuing statutory obligation to maintain that service of delivering gas in interstate commerce; the obligation is based on the certificate and on Section 7, and it supersedes any contractual provisions to the contrary. See Pet. App. 15a-24a; see also FERC Br. 21-30. The prudent operator standard is an appropriate and reasonable formulation of this service obligation.[7]

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[6] Moreover, even if CECA's attack on the effectiveness and enforceability of the Commission's standard were otherwise appropriate for judicial consideration, such consideration would be premature at this stage. The Commission has done no more than formulate and announce the standard. Because this initial action was held invalid by the court of appeals, steps to implement and enforce the standard necessarily have not been taken. And evidence concerning the standard's effectiveness and enforceability necessarily is not yet available.

[7] Accordingly, CECA's reliance on *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974) (Br. 41-42), is misplaced. In *Texaco*, the Court held that the Commission had used an affirmatively inappropriate standard by equating just and reasonable rates under the Act with prices of gas in the unregulated intrastate market. See 417 U.S. at 397-399. There is no basis for claiming that the prudent operator standard is similarly at odds with the basic purpose of the Act.

The standard is not vague and unenforceable, as CECA contends (Br. 43-50). Indeed, one of the reasons for adopting the standard was that it was consistent with requirements long established by leases and by state and federal regulatory agencies, so that "producers are very familiar with the requirements of this standard" (Pet. App. 16a). The Commission has chosen and defined the standard so it can be administered consistently with long-established state and federal production standards, so it will reflect the practical realities of gas reservoir mechanics,[8] and so at the same time it will ensure that producers do not default on their service obligations under the Natural Gas Act by failing to act with reasonable prudence.[9]

CECA is also wrong in claiming (Br. 46-50) that the standard is unenforceable. As the Commission noted (Pet. App. 23a):

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[8] See FERC Br. 32 n.19.

[9] Contrary to CECA's characterization (Br. 37-41), the Commission's standard does not call for a mechanical application either of leasing covenants or of state conservation requirements. Rather, it calls on producers to perform their delivery obligations in accordance with the concepts of prudent conduct that guide them in their daily operations. The Commission found, on the basis of a comprehensive rulemaking proceeding, that these concepts may be suitably adjusted to assure maintenance of deliverability under the Natural Gas Act. Pet. App. 19a, 20a.

> [T]he data necessary to facilitate any Commission action deemed necessary in implementing the instant order is either currently required to be filed by the appropriate persons or will be required as a result of our order implementing Form No. 108. More specifically, any information and materials submitted by virtue of Form No. 108, Form No. 15 and Form No. 40 will be used to assist the Commission and its Staff in enforcing certificated obligations.[10]

The Commission thus has available to it extensive information, furnished on a continuing basis, that will allow it to monitor changes in proved reserves and in the deliverability of those reserves. Any abnormal reduction in deliveries that is reported, com-

[10] Form No. 15 is required by 18 C.F.R. 260.7. This regulation requires natural gas pipelines to submit an annual report of gas supplies summarizing system deliverability, reservoir data, and remaining recoverable salable gas reserves; a delivery estimate for each supply source; and estimates of committed reserves and deliverability for other supply sources. These data are used by the Commission to "make a continuing review of gas reserves and deliverability of pipeline companies." 31 F.P.C. 750 (1964).

Form No. 40 is required by 18 C.F.R. 260.13. This regulation requires producers to furnish information concerning proved reserves, broken down by company, field, reservoir, and location. See Order No. 526-B, Docket No. RM74-16, issued June 30, 1977. The Commission has, however, postponed the effectiveness of Form No. 40 pending approval by the Office of Management and Budget. FERC Order No. 526-E, November 22, 1978.

Additional information is available to the Commission through Form No. 108, 18 C.F.R. 260.6, which identifies producing acreage by contract and location, actual delivery pressure, and BTU content.

plained of, or observed can be investigated, and the Commission can require the submission of additional information. Sections 10 and 14 of the Act, 15 U.S.C. 717i and 717m. Hence there is no reason to doubt that the prudent operator standard can be enforced. That other or even better standards might be developed does not render the Commission's invalid. *Vermont Yankee, supra,* 435 U.S. at 543-544; *FCC* v. *National Citizens Committee for Broadcasting, supra,* 436 U.S. at 803.

3. It is noteworthy that CECA, while criticizing the Commission's standard, at no point makes clear what alternative standard it believes the Commission should have adopted for defining producers' service obligations under the Act. CECA demands "a standard reflecting the Act's fundamental concern for maintenance of service," one "that is free from vagueness, and gives producers, consumers and Commission staff concrete guidance as to the supply obligations imposed by the Natural Gas Act" (Br. 26). But CECA declines to flesh out this abstract ideal. While CECA previously suggested that the Commission should impose some quantitative delivery requirement on each producer or should return to the standard originally proposed by the Commission in Order No. 539 (see Br. 15), CECA now offers only some unformed and tentative ideas (Br. 48-49), buttressed with assurances that "these problems are surely not insoluble," that "[a]pplying its expertise, the Commission should be able to develop a workable system of review * * *," and that "[c]learly, then, there are manageable solutions in the supply arena" (*ibid.*).

CECA, it appears, is now unwilling or unable to back up its criticism by proposing any specific alternative that it claims would be superior to the standard adopted by the Commission.[11]

4. If CECA still contends that the Commission must formulate a deliverability standard in terms of specific daily volumes of gas to be incorporated in each producer's certificate, the Commission reasonably declined to adopt such a formulation. As noted in our main brief (pages 6-12), the Commission initially, in Order No. 539, issued a declaration of policy stating that producers holding certificates under the Act had enforceable obligations with respect to the deliverability of "certificated volumes of natural gas supplies" (A. 11). Order No. 539 further provided that all certificates thenceforth issued should state a "certificated minimum daily delivery obligation of the seller" that would be derived from the gas sales con-

[11] CECA complains (Br. 42) that the Commission failed to investigate the producers' claims with respect to the nature of gas sales agreements and their production obligations under those agreements. However, CECA made no effort to demonstrate that these claims were unfounded or inaccurate. Instead, it confined itself to insistence that the Commission should impose fixed daily delivery obligations (A. 416-422). The Commission called for responses to questions, suggested by CECA, as to whether gas sales contracts contained specific delivery obligations (R. 451-465; A. 404). On the basis of these responses, the Commission found that it "must conclude that the clause is not one that has a generally accepted meaning among pipelines and producers" (Pet. App. 12a). The Commission thus fully ventilated all questions raised by CECA.

tract but that would disregard any contrary contractual reservations (A. 12-13).

Producers protested Order No. 539 on the grounds, among others, that "certificated minimum daily delivery obligation" has no generally understood meaning among producers and that many gas sales contracts attached to Commission certificates do not provide for the delivery of any specific volume of gas per day. See A. 268. In response to such protests, the Commission instituted a rulemaking proceeding, considered written comments and oral arguments (A. 272), and on that basis concluded in Order No. 539-B that the term "certificated minimum daily delivery obligation * * * is not one that has a generally accepted meaning among pipelines and producers" (Pet. App. 12a). The Commission therefore declined to formulate a general deliverability standard in terms of specific volumes of gas, although it also stated that where a particular sales contract did call for the delivery of specific volumes, the producer's delivery obligations would be measured by those specific contract requirements (Pet. App. 15a). That decision was a reasonable one, and CECA advances no reasons for concluding otherwise.[12]

[12] If, as in a typical example, a producer applied for and obtained a certificate authorizing interstate sales pursuant to a contract with a pipeline that required the producer to sell to the pipeline all gas produced from a particular leasehold without specifying how much gas the producer was to produce or deliver on a daily basis, there would be obvious difficulties in quantifying the producer's statutory delivery obligation. CECA suggests no satisfactory method for doing so. Even if

CONCLUSION

The Court need not reach the second question presented in No. 77-1654, but if it does reach that question, the Commission's order should be affirmed.

Respectfully submitted.

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some method could be conceived, this Court has consistently recognized that questions of administrative feasibility and enforcement are "matter[s] for the Commission to consider." *FPC* v. *Texaco Inc.*, 417 U.S. 380, 401 (1974).

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